No. 89-1836

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DOMINIC P. GENTILE,
Petitioner

v.

STATE BAR OF NEVADA,
Respondent

On Writ of Certiorari to the Nevada Supreme Court

BRIEF OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Amendment's speech and press clauses limit the power of a State to punish a lawyer for holding a press conference to respond to charges against his client, assert his client's innocence, and summarize the defense, when there is no record evidence that the conference could or did interfere with the impartial administration of justice?

2. Whether, and if so under what circumstances, speech about public officials' behavior on an issue of public concern may be forbidden because the speaker is counsel in pending litigation involving those officials and issues?

3. Whether a state Supreme Court Rule forbidding lawyer extrajudicial statements having a "substantial likelihood of materially prejudicing an adjudicative proceeding," and decreeing that publicly expressing "any opinion as to the guilt or innocence of a defendant" or the "credibility of a . . . witness" is "ordinarily . . . likely" to have such an effect, while permitting comment "without elaboration" on "the general nature of the . . . defense," is impermissibly vague and overbroad under the First Amendment and the Due Process Clause?

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OPINIONS AND JUDGMENTS IN THE COURTS BELOW

The opinion of the Nevada Supreme Court is reported as *Gentile v. State Bar of Nevada*, 106 Nev. 60, 787 P.2d 386 (1990). The judgment of the Southern Nevada Disciplinary Board, (JA 2) is unreported.

STATEMENT OF JURISDICTION

The judgment of the Nevada Supreme Court was entered and filed on February 21, 1990. This Court has jurisdiction under 28 U.S.C. § 1257 (1988), because petitioner raised and preserved, and the highest court of the state specifically rejected, a constitutional claim.

CONSTITUTIONAL AND RULE PROVISIONS AT ISSUE

The text of the Constitutional and rule provisions at issue are set out in the appendix to the petition for certiorari.

STATEMENT OF THE CASE

Dominic Gentile is a Nevada attorney with an unblemished national reputation as advocate, teacher, author, and bar leader. Mr. Gentile represented Grady Sanders in a highly publicized criminal case involving the disappearance from a safety deposit box at his company's storage facility of large amounts of cocaine and traveler's checks used by the Las Vegas police as part of an undercover operation. Mr. Gentile was disciplined by the State Bar for making statements to the press which were nonetheless found to have no prejudicial effect on trial fairness. These limited press statements were made well in advance of trial in response to a barrage of police and prosecution-initiated publicity adverse to the defendant.

PUBLICITY BEFORE THE SANDERS' INDICTMENT

The disappearance was an event of some moment in the Las Vegas community and it spawned intense media coverage of the investigation, indictment, and trial of Sanders. Throughout the year-long investigation, the State focused attention on Sanders, diverted suspicion from two undercover police officers who had direct access to the safety deposit box, and forcefully proclaimed their innocence.

On Saturday, January 31, 1987, undercover officers affiliated with the Intelligence Bureau of the Las Vegas Metropolitan Police Department (Metro Police), discovered the theft of nearly $300,000 in American Express traveler's checks and a large amount of cocaine from a safety deposit box at the Western Vault Corporation in Las Vegas.[1] (Sun, Feb. 3, 1987, JA 108.[2])

[1] The checks and drugs were maintained in a lock box rented by police in their undercover roles who used it as a "flash roll" to demonstrate the agent's ability to engage in illegal transactions.

[2] Reference to newspaper and television broadcasts are cited with the name of the paper, the Las Vegas Sun (hereinafter "Sun") and the Las Vegas Review-Journal (hereinafter "R-J") or television channel, the date of publication or transmission, and the Joint Appendix page number wherein the report is contained. The Joint Appendix contains excerpts of a synopsis of media coverage submitted by Mr. Gentile as Respondent's Exhibit A at the hearing below. Articles not included in the Joint Appendix are contained in the Exhibit and are cited by page number.

Several days after the discovery, John Moran, the popular and widely-respected sheriff of Las Vegas, held a press conference at which he identified Metro Police as the victim of the theft, announced a major investigation, and named both police and employees of Western Vault as possible suspects. (R-J, Feb. 2, 1987, JA 84-86; Sun, Feb. 3, 1987, JA 108-09). Sheriff Moran expressed his continuing personal confidence in the Intelligence Bureau which was described in early media coverage as an elite corps of detectives that had gained a nationwide reputation for its success in undercover operations. (*Id.*) He indicated that no officers had been disciplined and that he had "faith and trust" in them. (R-J, Feb. 2, 1987, JA 85.)

Over the next several days the press repeated that although possible suspects of the theft included both police and employees of the vault company, Sheriff Moran's confidence in the Intelligence Bureau remained high. (R-J, Feb. 4, 1987, JA 87.) The Metro Police disclosure that nine pounds of cocaine was missing included a statement that two undercover detectives with access to the safety deposit box had voluntarily submitted to a drug test with negative results. (R-J, Feb. 5, 1987, JA 88-89.)

The media reported a major turn in the investigation approximately a week later when the two officers were "cleared" of any wrongdoing and the investigation shifted toward vault company employees. Narcotic-sniffing dogs were brought in to search all of the boxes listed as empty on the company's records. The focus on the vault company came at the same time the Metro Chief of Detectives reaffirmed earlier reports that the two undercover officers had not been involved in the crime. (Sun, Feb. 1, 1987, JA 110-11.)

In early March of 1987 the focus on vault company employees narrowed to Mr. Sanders who was described as unwilling to cooperate in the investigation. (Channel 8 News Summary, March 10, 1987, JA 130.) It was alleged that he had previously drilled open customer's boxes without permission, found drugs in those boxes and failed to report this to the authorities. (R-J, March 12, 1987, JA 90-91.) At the same time, police sources were quoted as pursuing the theory that the theft was designed to discredit an ongoing undercover operation, and that Mr. Sanders was linked to targets of the operation. The operation was described as a major assault on organized crime. (*Id.*)

Mr. Sanders, who initially declined comment, stated to one TV station that the police were trying to shift blame away from themselves and complained of the Metro Police running a sting operation at his company's facility without his permission. (Channel 8 News Summary, March 10, 1987, JA 130-31.)

At the same time that the press was reporting the allegations that Mr. Sanders was not cooperative, Deputy Police Chief John Sullivan again stated publicly that the two officers had been cleared as possible suspects. He emphasized this by noting that both had voluntarily taken and passed polygraph examinations while Western Vault had declined to have its employees so tested.[3] (Sun, March 11, 1987, JA 112-13.)

In late March of 1987, Western Vault announced that it would close in order to prevent further breaches of client confidentiality caused by the government's sting operation and subsequent investigation. (Sun, March 26,

[3] Mr. Gentile believed that the prosecutors in the case were present when the police announced that the two undercover officers has passed polygraph exams. (JA 40, 55.) The press reported that the prosecutor who ultimately tried the case, Mr. Teuton, headed the year-long investigation. (R-J, Feb. 6, 1988, JA 100-01.) In any event, he viewed the prosecutor as responsible for the actions of his investigative agents. *Accord* Model Rules of Professional Conduct Rule 3.8(e) (1983).

1987, JA 114; R-J, March 26, 1987, JA 92-93.) Mr. Sanders again did not comment on the press stories. (*Id.*; Channel 3 News Summary, June 1, 1987, JA 130-31.) The press accounts of the plan to close Western Vault recounted earlier events and again repeated that the two undercover police officers had been cleared of any potential wrongdoing. (R-J, March 26, 1987, JA 93.) The Metro Police commander stated that Mr. Sanders had refused to cooperate, refused to take a polygraph test, and had failed to answer questions to the Metro Police Department's satisfaction. He concluded that the vault theft was an inside job. (*Id.*; Channel 8 News Summary, June 1, 1987, JA 130-131.)

Media attention was rekindled in the spring of 1987 when two Las Vegas newspaper commentators began a series of articles dealing with the prosecution of a well-known Las Vegas polygraph examiner, Ray Slaughter, who had administered the polygraph examinations to the two undercover officers responsible for the burglarized Metro lock box, Officers Schaub and Scholl. Slaughter was arrested in a cocaine sting involving an attractive undercover female informant. The articles disclosed that the FBI had information that Slaughter had stated that he had tested two undercover agents who had lied, and that his defense was that he had been set-up by the FBI in order to pressure him to testify against the two police officers. Initial accounts of the Slaughter case identified the two officers as "two of the most daring and respected cops on the force." (R-J, March 31, 1987, JA 94). The accounts also raised allegations that cash and contraband had been removed from other safety deposit boxes and placed into boxes maintained in the vault company's name. (*Id.*, JA 94-97; Sun, Jan. 7, 1988, JA 115-16.)

In a July 21, 1987 press report, police sources were quoted as once again reporting that the two undercover police officers had been cleared of any wrongdoing. A police captain, however, would not comment on whether Mr. Sanders would be criminally charged. (R-J, July 21,

1987, JA 98.) In the fall of 1987, leaks began to appear from the grand jury indicating that it was taking testimony in the Western Vault case and that the focus of its probe was on Western Vault employees. (Channel 8 News Summary, Oct. 8, 1987, JA 131.) The press reported that "investigators" believed that Western Vault allowed the unauthorized opening of boxes including Metro's box and that other victims were expected to testify before the grand jury. (*Id.*) The grand jury leaks continued through January of 1988 when press accounts indicated that an indictment was near and that Mr. Sanders was the key target. (Sun, Jan. 28, 1988, JA 121-23.)

SANDERS' INDICTMENT AND THE DEFENSE PRESS CONFERENCE

Mr. Sanders was eventually indicted and he was arraigned on February 5, 1988 on charges of larceny, racketeering and narcotics trafficking. The indictment included not only the theft of $1.3 million of narcotics and traveler's checks from the Metro safety deposit box but, in addition, a series of alleged thefts of more than $2 million from seven safety deposit boxes rented by other customers. (R-J, Feb. 6, 1988, J.A. 100-03; Sun, Feb. 6, 1988, JA 127-29.)

Dominic Gentile was retained by Grady Sanders several months prior to his indictment. (TR 57, JA 38).[4] Mr. Gentile brought to the Sanders defense a wealth of experience as a criminal law practitioner and an in-depth knowledge of the Las Vegas community and judicial system. During his 17 years of practice, Mr. Gentile has gained a national reputation as a criminal defense lawyer and bar leader.[5] (TR 53-56, JA 36-38.)

[4] Reference to the transcript of the hearing held by the State Bar of Nevada, Southern Nevada Disciplinary Board on April 17, 1989 are also cited as TR —. The entire transcript is reprinted in the Joint Appendix at JA 6-82.

[5] Mr. Gentile served for six years on the Board of Directors of the National Association of Criminal Defense Lawyers, was Associate Dean of the National College for Criminal Defense at the University of Houston's Bates College of Law, was chair of the RICO Case Committee of the ABA's Criminal Justice Section, published books and articles on criminal law topics, and was active in the ABA, Illinois, and Nevada Bars. (TR 54-57, JA 36-38.)

Because of the "tremendous imbalance" that Mr. Gentile perceived had been created by the State's improper publicity tactics, he pondered how he might redress this injustice.[6] The night before the arraignment, Mr. Gentile met with two other attorneys to consider the ethical limits of what he could say to the press about the Sanders case. (TR 65-66, JA 42-43.) Mr. Gentile was aware of general limitations on pretrial publicity but was unclear as to the exact application of Nevada Supreme Court Rule 177 (1976) (hereinafter "Rule 177") in particularized factual situations. (TR 66, JA 43.) Working through the evening, the attorneys focused their attention on Rule 177 and the general First Amendment limits on the State's ability to regulate attorney speech.[7] (TR 66, JA 43.) Mr. Gentile reached several conclusions that evening. The first was that the time be-

[6] At the time of the indictment, Mr. Gentile's principal concern was the adverse impact on potential jurors of the state's disclosures that the two police officers had passed polygraphs and had been formally cleared. This prejudice was compounded by the announcement that Sanders had refused to take a police polygraph exam. He was aware that press accounts consistently mentioned that the polygraph cleared the police suspects and was concerned because polygraph exam results can not be brought before the jury under Nevada law. (TR 61-62, JA 41.)

In planning his defense strategy, Mr. Gentile was also aware of the adverse effect of the pre-indictment publicity on his client. Mr. Sanders believed that he suffered millions of dollars in injuries as a result of the adverse publicity. (Las Vegas Sun, August 27, 1988. P1B., Resp. Ex. A.) He was forced to close Western Vault Company and lost a ground lease on a New Jersey casino due to his inability to obtain a gaming license as a result of the indictment in this case. (TR 62-64, JA 41-42.)

[7] The complete text of some of the materials consulted by the attorneys as well as handwritten research notes were contained as Respondent's Exhibit D at the hearing in this matter and are in the record.

tween any pretrial statement and the trial itself was an important determinant of the potential for prejudice. He concluded that the rule and applicable case law did, however, place limits on what he could say. He concluded that the state had poisoned the prospective juror venire and that his professional obligations required that he respond. (TR 89, JA 56.) Finally, Mr. Gentile was aware of the real limitations on his client's ability to defend himself in the press. He was concerned about waiver of privilege and his client's inability effectively to articulate his position. As a result, he instructed his client not to talk to the press and believed that he had an obligation to speak for him. (TR 71-73, JA 46-47.)

The next morning at the arraignment, Mr. Gentile declined to speak with the press at the courthouse, but rather convened an impromptu press conference at his office. While he had previously been involved in high-profile cases and had dealings with media representatives, he had never before held a press conference, and considered this a highly unusual step. (TR 64-65, JA 42.) Following arraignment, he knew that the trial would be at least six months in the future, August 8, 1988. (TR 67-68, JA 44.) At the press conference, he attempted to steer a course between the limitations that his research indicated Rule 177 imposed on his right to comment and his professional obligation vigorously to represent the interest of his client.[8] He began the conference with a brief statement emphasizing his client's innocence, and describing in summary fashion the defense theory that the persons in the best position to have stolen the drugs and money were the police officers, specifically, Detective Scholl. (Cert. App. 8a-9a.) His comments were carefully tailored to express only what trial evidence would prove and to steer clear of any potentially inadmissible evidence.

[8] A transcript of the press conference was reprinted in the appendix to the petition for certiorari, citations to the transcript will be listed as Cert. App. ——.

In his initial comments, Mr. Gentile addressed the portions of the indictment dealing with other individuals who claimed loss of property at Western Vault Corp. He stated that four of the alleged victims were known drug dealers and convicted money launderers. He noted that three of them had only come forward after they were already in trouble on other charges and trying to work themselves out of their predicament. (*Id.*)

Following this brief presentation, Mr. Gentile took questions from the floor. In several instances he refused to answer questions because his view of his ethical obligations prohibited a response. (Cert. App. 9a-13a.) He disclosed that he had investigated Detective Scholl but refused to discuss the results. He also refused to discuss the FBI investigation. (Cert. App. 10a.) He referred several times to Mr. Sanders as a scapegoat.[9]

When asked by reporters to elaborate on the credibility of the victim witnesses, including giving details on their background, Mr. Gentile refused to respond, again citing his ethical responsibilities. He specifically referred to his review of the literature the evening before and said that he could not name which specific individuals had a drug background. (Cert. App. 11a.) When asked about the polygraph examination of the police officers, Mr. Gentile again refused to comment but did state that his client had not taken a police polygraph. Finally, Mr. Gentile strongly implied that Detective Scholl had used cocaine in an earlier undercover operation. (Cert. App. 14a.)

Mr. Gentile's press conference was reported on one television station and in the two Las Vegas newspapers.

[9] Mr. Gentile was also critical of Metro's failure to alert Western Vault to the ongoing undercover operation being conducted in its facilities, stating that other law enforcement agencies had previously conducted such activities and had always disclosed them to management. He spoke about the risk to innocent parties in undercover sting operations and specifically referenced risks associated with undercover agents flashing drugs and large amounts of money at the Western Vault facility. (Cert. App. 10a-11a.)

(Channel 8 News Summary, Feb. 5, 1988, JA 131-132; Sun, Feb. 6, 1988, JA 127-129; R-J, Feb. 6, 1988, JA 100-03.) The television report included coverage of a Metro Police news conference at which Chief Sullivan restated that the officers in question had been cleared by a polygraph examiner. (Channel 8 News Summary, Feb. 5, 1988, JA 132.) In press accounts, the Sanders prosecutor, Mr. Teuton, responded to Mr. Gentile's statement by arguing that the indictment was legitimate, and that he had to have proof beyond a reasonable doubt of defendant's guilt before bringing charges. (Sun, Feb. 6, 1988, JA 128-29.) The press also quoted Chief Sullivan's statement from his press conference that the two detectives had nothing to do with the alleged crimes. (*Id.*, JA 129.)

The trial began on August 10, 1988, and was preceded by a careful voir dire conducted by the trial judge. (TR 74, JA 48.) He inquired of juror exposure to pretrial publicity and was able to impanel a jury free of any media taint. (Resp. Ex. B and C, transcript of voir dire.) During his opening statement, throughout the presentation of the evidence, and in closing argument, Mr. Gentile reiterated the same defense that he had referred to in summary fashion during the press conference. He brought out the credibility problems of the alleged victims, and Detective Scholl's prior drug use, and his position as the most likely person to have stolen the traveler's checks and drugs. (TR 73, 108-109, JA 47, 67.) At the conclusion of the trial, Mr. Sanders was acquitted on all counts. (Sun, August 27, 1988, JA 47; Resp. Ex. A).

In a March 8, 1988 letter to the Executive Director of the Nevada Bar, Chief Justice Young of the Nevada Supreme Court complained of Mr. Gentile's press conference and attached newspaper accounts of the conference. (JA 83.) On December 6, 1988, an ethics complaint was filed alleging a violation of Rule 177 by Mr. Gentile in the conduct of the press conference. Mr. Gentile answered the complaint and a hearing was held before the Southern Nevada Disciplinary Board.

At the hearing, bar counsel relied exclusively upon the following evidence: a videotape of the press conference, the complaint, and two letters authored by Mr. Gentile. (TR 1-18, JA 1-16.) Mr. Gentile, through counsel, presented a lengthy defense. An extensive compendium of newspaper articles dealing with the Sanders case and transcripts of television coverage were submitted. (Resp. Ex. A.) The transcripts of *Sanders'* jury voir dire and press conference videotape were submitted. The defense presented witnesses who were knowledgable in both the criminal justice process in Nevada and the media's relationship with the court and law enforcement agencies.

The defense witnesses included: the President and Associate Editor of the Sun, a former criminal defense lawyer (TR 21-51, JA 18-34); another former criminal defense lawyer currently serving as in house counsel to a Las Vegas television station (TR 99-111, JA 62-68); a former prosecutor (TR 111-122, JA 68-74); and the Federal Defender for Las Vegas (TR 122-126, JA 75-77). The media witnesses testified to a pronounced imbalance in reporting on criminal cases with reporters having much greater access to police and prosecutors than the defense. (TR 26, 43, 104-09, JA 20, 30, 65-67.) The imbalance was attributed to defense reluctance to comment, persistent public interest in criminal coverage, and a nationwide trend for law enforcement officials to emphasize their good works and effectiveness in order to further their institutional interests. (TR 26, JA 20-21.)

The four witnesses reviewed the press and voir dire exhibits and concluded that Mr. Gentile's comments were necessary and appropriate, and had not caused any trial prejudice. (TR 35, 108, 115-16, 124, JA 25-26, 67, 71, 75-76.) One witness referred to her knowledge of studies demonstrating that television viewers quickly forget comments made on only one occasion (TR 107, JA 66), and that several repetitions are necessary for retention. Several of the witnesses expressed their confusion over the lack of clarity in Rule 177. (TR 115-17, 121, JA 71, 74.)

Mr. Gentile testified in his own defense and reviewed at length the events that led up to the press conference, including his uncertainty regarding the language of Rule 177 (TR 93, JA 58.) He stated that in his view, the allowance of comment on the nature of the defense in Rule 177(3)(a) could not be reconciled with Rule 177(2)'s prohibitions on statements about witness credibility or client innocence. (TR 94, JA 59.) He reiterated his belief that the length of time prior to trial was the principal determinant of likely prejudice, alluding to the cases he had read, including one from this Court, indicating that two months before trial was a sufficient time to mitigate any damage that statements to the press might cause. (TR 95, JA 59.)

The subsequent factual findings and conclusions of law authored by the Southern Nevada Disciplinary Board isolate six separate statements made by Mr. Gentile during the press conference, and conclude that these comments, reprinted in the margins,[10] had a substantial

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[10] These statements by Mr. Gentile were:

(i) ". . . the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being levelled against him, but that the person that was in the most direct position to have stolen the drugs and the money, the American Express Traveller's checks, is Detective Steve Scholl."

(ii) "There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Traveller's checks than any other living human being."

(iii) "Now, with respect to these other charges that are contained in this indictment, the so-called other victims, as I sit here today I can tell you that one, two—four of them are known drug dealers and convicted money launderers and drug dealers; three of whom didn't say a word about anything until after they were approached by Metro and after they were already in trouble and are trying to work themselves out of something."

(iv) "Now, up until the moment, of course, that [the other victims] started going along with what detectives from Metro wanted them to say, these people were being held out as being

likelihood of materially prejudicing the *Sanders* trial in two respects: (i) they related to the character, credibility reputation and criminal record of witnesses in the *Sanders* trial (a violation of Rule 177(2)(a)); and, (ii) they contained an opinion as to the guilt or innocence of Mr. Sanders (a violation of Rule 177(2)(d)).

Mr. Gentile appealed this recommendation to the Nevada Supreme Court, waiving the confidentiality of his discipline. The Nevada Supreme Court affirmed all findings of the Disciplinary Board, including that Mr. Gentile knew, or reasonably should have known, that his comments had a substantial likelihood of creating trial prejudice. The court found no actual prejudice but based its ruling on the substantial likelihood of material prejudice. Finally the court rejected without discussion the constitutional challenges presented here as without merit.[11]

SUMMARY OF THE ARGUMENT

In order to resolve the potential tension between the First Amendment rights of attorneys and the Sixth Amendment rights of the State, this Court need not assign priority as between these constitutional protections, but can accommodate both by requiring actual prejudice or a substantial and imminent threat to a fair trial as a pre-condition to the suppression of otherwise protected speech.

Attorney speech on pending litigation is an invaluable source of knowledge, criticism, and evaluation of a vital component of the government. The importance and preva-

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incredible and liars by the very same people who are going to say now that you can believe them."

(v) "I think Grady Sanders was indicted because he—he was a scapegoat the day they opened the [safe-deposit] box."

(vi) "We've got some video tapes that if you take a look at them, I'll tell you what, he [Detective Scholl] either had a hell of a cold or he should have seen a better doctor."

[11] Both the Board (JA 5) and the Nevada Supreme Court (Cert. App. 4a), summarily rejected petitioner's constitutional challenges to Rule 177.

lence of such speech in the early days of the republic illuminates the historic purpose of the First Amendment.

In a series of cases, this Court has applied the clear and present danger test to commentary by observers of, and participants in, the justice system. This Court developed certain "working principles" about such speech. These include: (1) broad gauge speech bans, whether legislative, regulatory, or judicial, are constitutionally suspect; (2) punishment or suppression of narrow categories of speech must rest on a proven, clear, and imminent danger of identified harm; and (3) before prohibition or punishment is justified, less restrictive alternatives must be shown to be unavailable or unavailing.

These working principles have been applied uniformly to protect the speech of participants in the justice system and should apply with equal force to the attorney comments at issue here. Rule 177 violates these working principles. It does not incorporate the clear and present danger standard, and categorically limits speech based upon a tendencies test. The Rule's categorical proscription on speech also fails to account for the availability of less restrictive means to eliminate the potential for prejudice.

There is no legal or policy justification for granting lawyers inferior First Amendment status as speakers. Rather, the State should shoulder the burden of proof to justify any special departure for lawyer speech from the standards applied to other commentators on the justice system. Suppression of lawyer speech not only violates the First Amendment rights of the lawyer, but also the rights of the client and the public. Finally, Rule 177 is unconstitutionally vague and carries with it the potential for discriminatory enforcement. Its failure to give adequate notice additionally creates the risk of overbroad application to otherwise protected speech.

ARGUMENT

I. THE NEVADA SUPREME COURT'S RULE UNCONSTITUTIONALLY ABRIDGES THE FREEDOM OF ATTORNEYS TO COMMENT ON PENDING LITIGATION.

In the past, this Court has refused to "assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976). We do not today ask the Court to make that difficult choice. Rather we ask the Court to apply the clear and present danger doctrine to the speech at issue here: the same vehicle this Court has utilized in the past to *avoid* such conflicts in cases where the competing constitutional interests were substantial, including alleged threats to the administration of justice. Indeed, when the Court has focused on Sixth Amendment fair trial rights standing alone, it has strictly applied an actual prejudice test, refusing to remedy potential, yet unrealized, prejudice to fair trial interests.[12] We suggest that, rather than elevating the State's Sixth Amendment fair trial interests over the First Amendment rights at issue here, the Court should accommodate both interests by requiring actual prejudice or a substantial and imminent threat to fair trial as a precondition to the suppression or sanction of otherwise protected speech.

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[12] *See Smith v. Phillips*, 455 U.S. 209, 216 (1982) (absent proof of actual juror bias, no Sixth Amendment violation from juror's having job application pending with prosecutor's office); *Strickland v. Washington*, 466 U.S. 668, 697 (1984) (Sixth Amendment right to effective assistance of counsel violated only where actual prejudice is demonstrated); *United States v. Morrison*, 449 U.S. 361, 365 (1981) (no Sixth Amendment violation based on government misconduct absent actual prejudice). *See also United States v. Bagley*, 473 U.S. 667 (1985) (government's failure to produce exculpatory evidence a due process violation only if it affected outcome).

A. Petitioner's Speech Is Protected by the First Amendment.

The speech involved in this case—speech of an attorney about pending litigation—must be viewed in the broader context of the public's persistent and legitimate interest in the conduct of its business in the nation's courts. When considered alongside the history and jurisprudence of the First Amendment, petitioner's speech falls squarely within the area sheltered from government prohibition and punishment.

1. *The History of the First Amendment Demonstrates that Petitioner's Speech is Core Speech.*

The Framers of the Bill of Rights rejected the British system of press restraint, and our early history as a nation reinforced that view. We invoke that history by referring to this Court's exposition of it in *Bridges v. California*, 314 U.S. 252, 263-68 (1941).

The years since 1941 have added to our knowledge of the First Amendment's historical underpinning. The lawyer has been for all our history a public citizen, with as much a right and duty to speak out against injustice as to represent its victims in particular cases. And lawyer and litigant do not, by virtue of their status, forfeit their rights to comment and to truthful speech.

Leonard Levy, in *The Legacy of Suppression* (1960) [Levy I], criticized the view of history taken in *Bridges* and other cases. In his second edition, retitled more neutrally (and accurately) *Emergence of a Free Press* (1985) [Levy II], Professor Levy revisited the sources and conformed his view of the purpose of the First Amendment more closely to that relied on by this Court in *Bridges*. Levy II, at ix-xix.

We would not say that examination of admittedly incomplete historical records can wash away the First Amendment teaching of this Court's cases. But we do contend that the Court was right in *Bridges* about the central lesson to be drawn from the colonial and post-Revolutionary experience.

When James Otis litigated about the writs of assistance, he was not shy about speaking in public of the injustices he saw in those cases. *See* J. Quincy, *Report of Cases Argued and Adjudged in the Supreme Courts of Judicature of the Province of Massachusetts Bay* 51-57, 469-82 (1865); *see also* 2 *Legal Papers of John Adams* 106-47 (L. Wroth & H. Zobel eds. 1965). When John Adams was retained to represent John Hancock in a forfeiture proceeding, his contentions and later a text of his undelivered argument were thoroughly aired in the press of the time, along with running commentaries on the legal issues. *Id.* at 173-210. These court cases were "the Commencement of the Controversy, between Great Britain and America," according to an Adams letter of July 3, 1776. *Id.* at 107 n.2.

While the records available do not always identify the authors of contentious comments on pending cases, the concepts and vocabulary point clearly to lawyers as the source. The *Zenger* case of 1735, that most famous colonial seditious libel prosecution, put the wrong man in the dock. Zenger did not write the material for which he was prosecuted. The strident attacks on the administration of New York Governor Cosby, including pointed references to his manipulation of the judicial process, were written by lawyers.[13]

Although Eleazer Oswald was a printer and perennial litigant and not a lawyer, his pointed and even gleeful attacks on the administration of justice in Pennsylvania are well-documented. *See, e.g.*, Teeter, *The Printer and the Chief Justice: Seditious Libel in 1782-83*, 45 Journalism Q. 232 (1968); Teeter, *Press Freedom and the Public Printing: Pennsylvania, 1775-83*, 45 Journalism Q. 539-44 (1968). *See also* Levy II 370. Oswald not only mocked Chief Justice McKean, but published "A Hint to Grand Juries" on the eve of that body's consid-

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[13] One of the authors was a former judge, Lewis Morris. *See* L. Powe, *The Fourth Estate and the Constitution: Freedom of the Press in America* 8 (1991); Levy II 37-45.

eration of politically-motivated charges against him. Oswald also warned "every lawyer" not to appear in court against a printer, lest:

> "His name should, like his carcass, rot
> In sickness spurn'd, in death, forgot."

Teeter, *supra*, p. 17, at 240.

Levy II contains dozens of examples, though mostly more polite, of contentious, robust, and wide-open debate by lawyers about the justice system. *See generally* Levy II 173-219. The colonial and post-Revolutionary history tells us more than that the press clause has independent significance, although it surely tells us that. *See* Anderson, *The Origins of the Press Clause*, 30 UCLA L. Rev. 455 (1983). The criminal process, and related types of actions such as forfeitures, were essential means of social control by an increasingly unpopular and beleaguered British colonial authority. The press response to these judicial proceedings was a tocsin to the polity. Colonial and post-Revolutionary history establishes the tradition of lawyer comment on pending litigation.

Colonial courts attempted to suppress criticism directed at courts and their proceedings, as had been the practice in England. The "bad tendency" test, as reflected in Rule 177, is derived from these repudiated efforts to limit speech and is indeed of illegitimate lineage. It was part of the English offense of seditious libel. *See* G. Stone, "Sedition" 4 *Encyclopedia of Crime & Justice* 1425 (S. Kadish ed. 1983). Professor Stone aptly summarizes the law:

> The trial was structured so as to leave most of the critical decisions in the hands of government officials. In prosecutions for seditious libel, the common-law jury was permitted to decide only whether the defendant had actually published the words in question. The judges reserved to themselves the central issues of malicious intent and bad tendency. Although the intent and tendency concepts had the potential to limit significantly the doctrine of seditious libel, in the hands of judges they were of no appreciable consequence. The judges simply inferred bad intent and bad tendency from the very fact of the libel. In practical effect, then, the criticism itself became criminal. And, of course, truth was no defense.

Id. at 1426.

The fate of seditious libel in the colonies is well-known. After the *Zenger* case, the British and their surrogates did not dare attack colonial printers in this way. *See Anderson, supra* p. 18, at 510. Even in England, attempts to enforce the libel laws met with repeated rebuke. *See* Tigar, *Crime Talk, Rights Talk and Double-Talk: Thought on Reading Encyclopedia of Crime and Justice*, 65 Tex. L. Rev. 101, 113-27 (1986).

The epitaph of seditious libel was written by the First Amendment. Madison thought, in his 1789 Report on the Virginia Resolutions, it had been written long before:

> In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands . . .

Quoted in *Anderson, supra* p. 18, at 510 n.307.

The presumption of bad tendency, without proof of actual or prospective harm, and the elimination of any requirement that the speaker intended harm, are hallmarks of the procedure employed in this case by the Nevada authorities. The Rule is in conflict with the historic recognition of the importance of open comment on the affairs of justice, and the resulting body of law both tolerant of speech and protective of the fair administration of justice.

2. *This Court's Precedent Establishes the Clear and Present Danger Standard as the Appropriate Test Governing Regulation of Speech About Pending Litigation.*

This Court has uniformly upheld the First Amendment rights of interested persons and participants to re-

port and comment on the people's business in our system of justice and has consistently turned aside government efforts to ban or punish speech about pending litigation. In so doing, this Court has confronted one specter after another of perceived evils raised to justify banning speech on matters of such public importance, but none has withstood the searching scrutiny the First Amendment compels.

In *Bridges*, for example, the Court invalidated the contempt convictions of a newspaper publisher, the Times-Mirror, and a union official for their speech critical of judicial handling of pending litigation about labor strife. Initially, the Court rejected the contention that our law of speech was premised upon British common law. 314 U.S. at 263-64. To accept this argument, according to the Court, would be to "deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and the press.'" *Id.* at 264 (quoting Scholfield, *Freedom of the Press in the United States*, 9 Publications Amer. Sociol. Soc. 67, 76).

Having dispatched the contention that the First Amendment is inapplicable to speech about pending litigation, the *Bridges* opinion applied prevailing First Amendment analysis, the clear and present danger standard, to the challenged speech. According to the Court, "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." 314 U.S. at 263. Application of this "working principle," necessarily precludes the use of either an "inherent tendency" or a "reasonable tendency" test to judge whether speech presents a threat to the administration of justice. *Id.* at 273. The Court declined to "start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials," and instead, examined the "particular utterances" to determine whether they posed an ex-

tremely serious and imminent danger. *Id.* at 271. The challenged speech, including Bridges' threat of a broad labor strike unless the court granted a new trial motion, was found wanting under the clear and present danger standard.

In 1946, this Court reaffirmed the "working principle" of *Bridges* in *Pennekamp v. Florida*, 328 U.S. 331 (1946). Justice Reed, writing for the Court, acknowledged that the clear and present danger test had the "vice of uncertainty" but saw guidance emerging from its repeated application by the courts. *Id.* at 334. Significantly, the *Pennekamp* opinion held that the Court could not defer to the state court's conclusion of harm, but rather it "was compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts." 328 U.S. at 335.[14]

At issue in *Pennekamp* were vituperative and inaccurate newspaper editorials that generally accused Florida judges of coddling criminals. The Court held that "Freedom of expression should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice," *id.* at 347, and concluded that the publications in issue did not pose a clear and present danger to the administration of justice.

Only a year later, in 1947, this Court returned to "the principles announced" in *Bridges* and *Pennekamp* in *Craig v. Harney*, 331 U.S. 367, 368 (1947), and overturned contempt convictions of a newspaper publisher and newspaper staff based upon their unflattering description of a trial judge's handling of a pending civil case and their support for the granting of a new trial motion. The *Craig*

[14] This holding would foreshadow the independent examination rule of the later cases. *E.g., Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984); *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964).

opinion noted that this Court had previously rejected a "reasonable tendency" test, and had chosen instead in *Bridges* and *Pennekamp* to weigh threats to fair trials under the more stringent clear and present danger standard. *Id.* at 372-73.[15] And even though the lower state court in Craig had purported to apply the clear and present danger test, this Court was compelled to make "an independent examination of the facts." *Id.* at 373. Though the articles were unfair criticism, this Court concluded they did not immediately imperil the administration of justice. *Id.* at 376-78.[16]

In 1962, this Court again confronted a contempt conviction for speech about pending litigation in *Wood v. Georgia*, 370 U.S. 375 (1962). In *Wood*, a trial court summoned the press to hear its instructions to a sitting grand jury about the need to investigate "Negro block voting" during a local political campaign. The county sheriff took exception and issued a press release complaining that the court's action constituted race agitation and then submitted an open letter to the grand jury implying that the court's instructions were false and suggesting that they should instead investigate the local Democratic party organization. *Id.* at 379-80. Relying on the clear and present danger "working principle" fashioned in *Bridges*, *Pennekamp*, and *Craig*, this Court reversed the sheriff's contempt conviction. *Id.* at 384-85.

In *Wood*, this Court held again that it was obligated to conduct an independent examination of the seriousness of the alleged threat. The *Wood* opinion faulted the lower court's conclusory findings and its failure to "indicate in

[15] Even Justice Frankfurter, writing in dissent, did not quarrel with the application of the clear and present danger test; he simply would have upheld the judgment of the Texas courts that the challenged speech posed such a danger to pending litigation. *Craig*, 331 U.S. at 391.

[16] In addition, the *Craig* opinion rejected the claim that, because the comment concerned a civil trial involving private disputes, the First Amendment offered any less protection than it did in criminal cases where there is a public concern. 331 U.S. at 378.

any manner *how* the publications interfered with the grand jury's investigation." *Id.* at 387 (emphasis in original). Moreover, the Court observed that the prosecution had called no witness "to show that the functioning of the jury was in any way disturbed" nor was there a showing "that the members of the grand jury, upon reading the petitioner's comments in the newspapers, felt unable or unwilling to complete their assigned task." *Id.* Consistent with the "working principle" announced in *Bridges*, the *Wood* opinion declined to accept conjecture about alleged dangers to the administration of justice in lieu of proof.[17]

The *Wood* opinion also acknowledged that "The administration of the law is not the problem of the judge or prosecuting attorney alone, but necessitates the active cooperation of an enlightened public." *Id.* at 391. Echoing Justice Black's opinion in *Bridges*, the *Wood* opinion found that it is because such speech touches upon matters of great public importance that it deserves constitutional protection, as the "type of danger evidenced by the record is precisely one of the types of activity envisioned by the Founders in presenting the First Amendment for ratification." *Id.* at 388; *cf. Bridges*, 314 U.S. at 268. Finally, the *Wood* opinion rejected the argument that the sheriff, as an officer of the court, was not entitled to the full First Amendment protections of the average citizen. 370 U.S. at 393.[18]

[17] Once again, the dissent in *Wood*, like Justice Frankfurter in the *Craig* case, did not dispute the applicability of the clear and present danger test, but rather agreed with the lower court's conclusion that it had been satisfied as to the sheriff.

[18] This consistent course of decision was reaffirmed in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), where the Court held that the right to report on events in the justice system must prevail even over a legislative assertion of a rape victim's right to privacy. Again, this Court focused on the important role of public scrutiny in monitoring the administration of justice, finding that press attention "serves to guarantee the fairness of trials." 420 U.S. at 492.

The final case in the evolution of the "working principle" begun in *Bridges* occurred in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). In *Landmark*, a Virginia newspaper was found guilty of violating a Virginia statute for disclosing the name of a judge that had been the subject of an ethics proceeding. Chief Justice Burger, writing for the Court, reversed the conviction.

Guided by *Bridges* and its progeny, the *Landmark* opinion employed the clear and present danger test, albeit not in the "mechanical" way that the Virginia Supreme Court had done below. While agreeing that the test was not "a technical legal doctrine" the *Landmark* opinion gave it content as follows:

> Properly applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood against the need for free and unfettered expression. The possibility that other measures will serve the State's interests should also be weighed.

Id. at 842-43.

The *Landmark* opinion rejected the contention that the Virginia legislature could, in the abstract and without "hard in-court evidence," make a conclusive finding that a category of speech posed a clear and present danger. *Id.* at 833 (quoting *Landmark*, 217 Va. 699, 712 (1977)). According to this Court, "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." 435 U.S. at 843 (citing *Pennekamp*).[19] Accordingly, no *presumption* of harm could attach as a result of the legislature's prior conclusions about *likely* harm. According to *Landmark*, fidelity to the

[19] Significantly, the *Landmark* opinion applied this demanding standard even though all parties, and the court below, had concluded that the criminal proceedings did not constitute a prior restraint, but rather were an after-the-fact sanction imposed upon speech.

"working principle" emerging from the consistent line of precedent since *Bridges* demanded a proof of extremely serious and imminent harm not present in the record before it. 435 U.S. at 845.[20]

3. *Broad Gauge, General Prohibitions on Speech Enforced by a Reasonable Tendencies Test Violate the First Amendment.*

The Court's opinion in *Landmark* is more than a result and a reason: it illuminates the difficult, and as yet not fully explored, path marked by the First Amendment to sustain state suppression of speech about pending judicial proceedings. The cases from *Bridges* to *Landmark* posit that broad gauge, general prohibitions on such speech enforced by a reasonable tendency standard abridge the First Amendment.

This Court's cases are unanimous in affirming the primacy of the First Amendment over government sponsored attempts to curtail speech about pending litigation. In so doing, this Court has preserved the balance struck by the framers of the First Amendment. The cases from *Bridges* to *Landmark* are also unanimous in applying the clear and present danger test to take the true measure of the threat alleged to justify suppression.[21]

In the efforts to give content to this standard by the means suggested by Justice Reed in *Pennekamp*—illustration in case by case analysis—this Court has steadily applied this standard to new and different speakers. All speakers, from the media to trial participants to court

[20] The vitality of the *Landmark* opinion, and its application to speech concerning pending litigation was recently re-affirmed in *Butterworth v. Smith*, 110 S. Ct. 1376 (1990), in which the Court, per Rehnquist, C.J., relied on *Landmark* to strike down a Florida statute prohibiting grand jury witnesses from disclosing information about which they testified.

[21] Even the dissenting Justices in these cases embraced the clear and present danger standard, and thus no Justice has ever questioned the appropriateness of this as the yardstick for measuring the harm caused by speech about pending litigation.

officers, have been subjected to the same First Amendment standard and all have received the same First Amendment protection. Finally, perhaps the most important lesson learned from the march of this Court's jurisprudence from *Bridges* to *Landmark* is that the *fear* of harm to the administration of justice is no substitute for *proof* of it.

It is true that none of these cases involved petit jury trials and the special problems that they create for the efficient and fair administration of justice in our courts. All of these cases, however, involved contentions that the challenged speech prejudiced the fair and impartial functioning of equally vital components of our justice system, including judges and grand juries. Moreover, while the jury system presents somewhat different considerations for measuring the threat posed by extrajudicial speech, so too does it offer numerous effective and time-tested means of removing the risk of potential juror prejudice. Those who would suppress attorney speech in the name of juror impartiality should the burden of proof, as did their predecessors in this Court's precedent, to establish that these existing mechanisms to eliminate juror partiality are inadequate to protect fair trial rights.

Of equal importance, this Court's precedent establishes that the alleged threat to the administration of justice is not provable by the method chosen here—reliance on general prohibitions of categories of speech enforced by a reasonable tendency standard. To the contrary, the First Amendment demands that courts make an independent examination of the magnitude and imminence of injury to the administration of justice. This is not a mechanical process, and courts cannot resort to abstract categorizations about speech and its alleged harm. Rather, courts must focus on the specific context of particular speech, with the proponent of suppression bearing the burden of identifying *how* that speech threatens serious and imminent harm to fair trial interests that is not curable by alternative means. Here the State clearly did not sustain the burden mandated by this Court's rulings.

Instead, it chose to rely exclusively on the presumptive prejudice of categories of speech contained in the Rule, indeed going so far as to acknowledge the absence of any prejudice to the overall fairness of Sanders' trial. Thus the record contains no direct evidence of a potential fair trial threat.

Mr. Gentile's carefully measured statements occurred sufficiently in advance of trial to insure the absence of prejudice. The utilization of means less instrusive upon speech rights by the trial court, here a voir dire of prospective jurors, eliminated any further risk of prejudice. The trial court found it unnecessary to utilize other available tools, including individual voir dire, sequestration, continuance, or transfer, that would have been appropriate if any substantial risk of prejudice existed.[22]

II. NEVADA'S ATTEMPT TO SUPPRESS CATEGORIES OF SPEECH IS INCONSISTENT WITH THE CLEAR AND PRESENT DANGER TEST AND THIS COURT'S HISTORICAL APPROACH TO THE FIRST AMENDMENT.

Three relevant principles emerge from this Court's First Amendment teaching in this area: (1) broad gauge speech bans, whether legislative, regulatory, or judicial, are constitutionally suspect; (2) punishment or suppression of narrow categories of speech must rest on a proven, clear, and imminent danger to an identified harm; and, (3) before prohibition or punishment is justified, less restrictive alternatives must be shown to be unavailable or unavailing. The rule here challenged, and its application to petitioner, violates each of these precepts.

Initially, of course, Rule 177 fails to identify the clear and present danger test as the appropriate principle to guide any analysis of limitations on lawyer speech.[23]

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[22] The record is silent regarding any statement by the prosecution to seek further protections from prejudicial pretrial publicity beyond simple voir dire. In fact, the prosecution appears to have never raised the issue.

[23] The ABA has promulgated several different standards for attorney speech, of which Rule 3.6 is the most recent. The first,

Starting from this flawed general standard, section 2(b) of the Rule then proceeds to carve out six categories of speech which are presumed to cause prejudice. *See* Rule 177(2)(b); Model Rules of Professional Conduct Rule 3.6(b) (1983) (hereinafter "Rule 3.6"); G. Hazard & W. Hades, *The Law of Lawyering* 666 (2d ed. 1990) (subsection (b) creates presumptions of prejudice.) Rule 177(3)(a) then purports to create safe harbors for seven categories of speech, some of which overlap those previously categorized as presumptively prejudicial in section 2(b), as long as the speech is made "without elaboration." This substitution of categorical bans on speech for the application of reasoned judgment to specific facts is incompatible with First Amendment jurisprudence.

This Court's antipathy toward categorical speech bans finds ample reason for expression here, as the blunt tool used to attack dangerous speech inflicts injury primarily upon protected speech. Rule 177's broad speech bans are directed at a threat which is exceedingly rare—the compromise of fair trial rights based on prejudicial pretrial publicity. As this Court has recognized, "In the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to this important right." *Nebraska Press*, 427 U.S. at 551. Indeed, this Court's cases "demonstrate that pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Id.* at 554.[24] *See Murphy v. Florida*,

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Model Code of Professional Responsibility, DR7-107 (1968) (hereinafter "DR7-107") employed a reasonable likelihood of prejudice standard. Prompted by scholarly commentary and adverse judicial reaction to DR7-107, an ABA Committee chaired by Judge Goodwin of the Ninth Circuit abandoned the "reasonable likelihood" standard of DR7-107, and promulgated a standard which expressly adopted the clear and present danger test of this Court's First Amendment precedent. ABA Standards Relating to the Administration of Criminal Justice, Standard 8-1.1. The ABA promulgated Rule 3.6 in 1983, and Nevada Supreme Court Rule 177 is patterned after it.

[24] In *Stroble v. California*, 343 U.S. 181 (1952), for example, this Court upheld a death sentence despite the prosecution's release

421 U.S. 794 (1975); *Beck v. Washington*, 369 U.S. 541 (1962).

The speculative character of such a risk was the reason why this Court, in *Nebraska Press*, refused to uphold a court order barring the pretrial publication of a defendant's confessions. After all, few criminal cases ever get to trial due to the prevalence of plea bargaining, *Nebraska Press*, 427 U.S. at 600 (Brennan, J., concurring); recent surveys suggest that less than 10 percent of criminal cases go to a jury for resolution. *See* Frasca, *Estimating the Occurrence of Trials Prejudiced by Press Coverage*, 72 Judicature 162 (1988). Even fewer cases attract sufficient attention to give rise to a plausible basis for concern about potential juror prejudice from publicity. And, in those isolated cases which do, the risk of juror prejudice from all sources is negligible. Indeed, one study conducted by Judge Bauer of the Seventh Circuit revealed that even in highly publicized cases, only half of one percent of prospective jurors could recall newspaper accounts they had read. *Id.* at 168.

In addition to the speculative character of potential juror prejudice, the *Nebraska Press* opinion held that alternate means of securing a fair trial were available, and the First Amendment required that they be exhausted first. *Id.* at 563-65. Nor can the burden of employing these means be cited as a rationale for limiting speech. As this Court recognized in *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), the threatened danger from speech must be an evil that "rises far above public inconvenience, annoyance or unrest."

Even had the prospective jurors been exposed to Mr. Gentile's comments, they would not necessarily have been

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of the defendant's confession to the press six weeks before trial; this Court concluded that the threat to a fair trial was avoided by receding publicity in the intervening six weeks and by voir dire. Indeed, in this case, Mr. Gentile testified he relied upon the *Stroble* case in making the determination that his speech, which took place six months before trial, did not pose a threat to a fair trial. (TR 95, JA 59.)

prejudiced as a result. *See Murphy*, 421 U. S. at 799; *Stroble v. California*, 343 U.S. 181 (1952). The director of the seminal University of Chicago jury study in the 1950's, Harry Kalven, concluded from his research that "the jury is a pretty stubborn, healthy institution not likely to be overwhelmed either by a remark of counsel or a remark in the press." Gillmor, *Free Press v. Fair Trial: A Continuing Dialogue—"Trial by Newspaper" and the Social Sciences*, 41 N.D.L. Rev. 156, 167 (1965) (quoting Kalven). According to another commentator, "Experiments to date indicate for the most part juries are able and willing to put aside extraneous information and base their decisions on the evidence." Simon, *Does the Court's Decision in Nebraska Press Association Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 Stan. L. Rev. 515, 528 (1977). Given the dearth of empirical evidence supporting the posited inference that attorney speech has a prejudicial impact on prospective jurors, the presumption of prejudice contained in Rule 177(2)(b) could not withstand the test this Court has required to uphold evidentiary presumptions generally. *See Ulster County Court v. Allen*, 442 U.S. 140, 165 (1979) (to be valid presumption, presumed fact must "more likely than not" flow from established fact).

Moreover, standard jury instructions direct jurors that (i) their verdicts must be based solely upon evidence admitted during trial; (ii) statements by lawyers are not evidence; and, (iii) they must disregard pretrial publicity. *See* 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* §§ 10.01, 10.03 (3d ed. 1977). Jury studies appear to justify the confidence our justice system has in the jury's willingness and ability to follow these and other instructions on the law. *See* Simon, *supra*; *Nebraska Press*, 427 U.S. at 564 (listing emphatic instructions as an alternative to speech restraints).

The effectiveness of these alternatives is evident in our nation's recent political history, as federal courts have successfully presided over such celebrated prosecutions

as those involved in the Watergate and Iran-Contra affairs. In particular, our system relies heavily upon the voir dire process to identify and to eliminate the potential influence of all sources of speech. The question raised here, of course, is whether voir dire and other available devices are inadequate to serve this same task for lawyer speech, thereby necessitating the speech regulation at issue. The heavy burden of proof in this regard falls squarely upon the State, and it must demonstrate that the traditional and time-tested methods for eliminating juror prejudice are unequal to the task of preventing prejudice attributable solely to attorney speech. *See Nebraska Press*, 427 U.S. at 570. In addition, even in those rare cases when speech poses a substantial and imminent threat to fair trial, this Court has identified yet another effective means of protecting those interests—the issuance of narrowly tailored judicial orders proscribing disclosure of prejudicial information. *See Nebraska Press*, 427 U.S. at 569.

Consequently, assessing the appropriateness of regulations on lawyer speech about pending litigation requires a balancing of the exceedingly limited risk of prejudicial publicity preventing a fair trial versus the palpable and recurrent injury to the First Amendment rights of lawyers, clients, and the public from speech suppression. In this context, petitioner submits that this Court should follow its prior First Amendment precedent and employ a clear and present danger analysis to the speech in this case.

III. THE FIRST AMENDMENT ADMITS OF NO EXCEPTIONS FOR LAWYERS.

The Nevada Supreme Court assumed that lawyers are not entitled to the same First Amendment protection enjoyed by ordinary citizens. *See In re Raggio*, 87 Nev. 369, 487 P.2d 499 (1971). To the contrary, this Court has repeatedly rejected arguments that lawyers and other professionals have diminished speech rights under the First Amendment. In addition, the speech under consideration here, speech about pending litigation, also affects the First

Amendment interests of non-lawyers, including clients and the public at large. Thus, singling out lawyers for reduced First Amendment protection will not reduce the need to afford plenary constitutional protections to the speech at issue.

A. The Constitution Does Not Create a Special and Inferior Status for Speech by Lawyers.

1. *This Court's Cases on Lawyer and Litigant Speakers.*

This Court has previously addressed the First Amendment protections afforded lawyers and other participants in the justice system and has not hesitated to offer attorneys First Amendment protection, even when their speech did not rise to the level of core speech involved here.

Even lawyer speech about ordinary commercial transactions enjoys First Amendment protection, although not to the same degree as core speech. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456-57 (1978). This Court has treated lawyer commercial speech like any other professional speech, and it has been no less protected because of its origins than, say the speech of pharmacists or corporations.[25] This Court has invalidated several bar association rules limiting lawyer commercial speech as constituting abridgements of the First Amendment. *See, e.g., Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988). Moreover, in these cases, the First Amendment prevailed despite arguments raised by the government that these rules were necessary to protect the legal system. *See Bates*, 433 U.S. at 375-76.[26]

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[25] *Compare Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) *with Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978).

[26] Nor does the State's interest in maintaining the "professionalism" of attorneys justify limiting attorney's First Amendment rights to advertise. *Bates*, 433 U.S. at 364.

Commercial speech imbued with more substantial First Amendment values, such as the right of association, is entitled to the full measure of First Amendment protection. Examples of such value laden commercial speech include *NAACP v. Button*, 371 U.S. 415 (1963), where this Court struck down a Virginia statute that prohibited attorneys from providing free representation, finding that litigation is "a form of political expression." *Id.* at 429.

Similarly, in *In re Primus*, 436 U.S. 412 (1978), this Court found that where a lawyer's actions "were undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU," *id.* at 422, they came "within the generous zone of protection reserved for associational freedoms." *Id.* at 431. In response to the State's contention that the Rule at issue deterred a substantial evil, solicitation of clients, this Court responded that the "decision in *Button* makes clear, however, that '[b]road prophylactic rules in the area of free expression are suspect,' and that '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'" 436 U.S. at 432 (quoting *NAACP*, 371 U.S. at 438).[27]

By contrast, cases involving speech about pending litigation by officers of the court or other direct trial participants is non-commercial and lies at the core of First Amendment values, for "it would be difficult to single out any aspect of government of higher concern and importance to the public than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980). More to the point here, "commentary on the fact that there is strong evidence implicating a government official in criminal activity goes to the very core of matters of public concern." *Nebraska Press*, 427 U.S. at 606 (Brennan, J., concurring).

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[27] *See also Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 5-8 (1964) (state bar cannot prohibit labor union from selecting legal spokesman for its membership).

In the *Bridges* case for example, this Court reversed a contempt sanction of a party representative, Mr. Bridges, for speech about pending litigation by applying the traditional clear and present danger analysis. 314 U.S. 252. The same result and analysis was used to invalidate the contempt conviction of sheriff Wood, an officer of the court, in *Wood*. 370 U.S. 375. *See also In re Little*, 404 U.S. 553 (1972) (clear and present danger test applied to reverse contempt conviction of a criminal defendant who called presiding judge a "M—— F——"; citing *Craig* opinion); *Eaton v. Tulsa*, 415 U.S. 697 (1974) (reversing the criminal contempt conviction of criminal trial witness who described assailant as "chickenshit" because not "imminent" threat to the administration of justice).

This Court has repeatedly declined to relegate lawyers to an inferior status under the First Amendment when their speech relates to ordinary commercial transactions. This reluctance to single out lawyers has extended to lawyer speech imbued with First Amendment values broader than that of commercial speech. This Court has likewise refused to differentiate amongst speakers as to the level of First Amendment protection afforded their speech on pending litigation. Here, Mr. Gentile's comments on possible corruption in the Metro Police Department was the type of core speech deserving of the highest level of constitutional protection.

2. *The Proper Standard for Lawyer Speech About Pending Cases.*

While these and the other cases discussed above provide a sure guide to decision, this Court has never squarely addressed the issue presented here: speech by a lawyer about a pending criminal case in which the lawyer was counsel. The courts of appeals and the state courts have spoken, but without agreeing on a standard.

This Court's teachings provide no support for those state and lower federal courts who have embraced the "reasonable tendency" test, or who have believed that broad-gauge rules obviate the need for detailed fact-

finding. Examples of such mistaken and unsupported opinions include *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) (en banc), and *Zimmerman v. Board of Professional Responsibility*, 764 S.W.2d 757 (Tenn.), *cert. denied*, 109 S. Ct. 3160 (1989).

Other federal and state cases do provide examples of First Amendment reasoning that attempts to follow the lead of *Bridges* and *Pennekamp*. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976), is one example, and is significant in part because it was the basis for the ABA's clear and present danger standard promulgated by the Goodwin Committee. *See* ABA Standards Relating to the Administration of Criminal Justice, Standard 8-1.1(a) (1978), modified in February 1991. Other courts have used a similar analysis. *See, e.g., Shadid v. Jackson*, 521 F. Supp. 85 (E.D. Tex. 1981); *Markfield v. Association of Bar of City of New York*, 49 A.D.2d 516, 370 N.Y.S.2d 82, *appeal dismissed*, 37 N.Y.2d 794, 375 N.Y.S.2d 106, 337 N.E.2d 612 (1975).

There can be no constitutional justification to assert, as the Nevada Supreme Court has done in the *Raggio* opinion, that lawyers, by virtue of their status, forfeit First Amendment rights available to the generality of citizens. *See In re Conduct of Lasswell*, 296 Or. 121, 125, 673 P.2d 855, 857 (1983). *Cf. Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977) (State cannot condition attorney's exercise of First Amendment rights upon waiver of Fifth Amendment rights). Singling out attorney speech for inferior First Amendment protection while protecting identical speech by non-lawyers fails to advance fair trial interests while unnecessarily diluting the First Amendment rights of attorneys. The State shoulders the burden of proof to justify any departure for lawyer speech from this Court's consistent treatment of such speech by non-lawyers. Moreover, this Court has traditionally declined to authorize speech regulations based solely upon speaker status. *See, e.g., First Nat'l Bank of Boston*, 435 U.S. at 777-84 (corporate

speech not subject to restriction solely because that of a corporation). The State may not discriminate between classes of speakers. *See Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92 (1972); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

Indeed, lawyer speech has unique worth under the First Amendment, as such commentary offers the most valuable and discerning source of information about pending litigation. Justice Rutledge, in his concurrence to the *Pennekamp* opinion, coupled his pointed observation that "There is perhaps no area of news more inaccurately reported factually, on the whole, though with notable exceptions, than legal news," with the explanation that journalists cannot be faulted for misunderstanding the complexities of the law. 328 U.S. at 371. Lawyers can and do serve a useful role in translating the work of our courts for an interested public. Broad prohibitions on lawyer speech during pending litigation "produce their restrictive results at the precise time when public interest in the matter would naturally be at its height. . . . [and are] likely to fall not only at a crucial time but upon the most important topics of discussion." *Bridges*, 314 U.S. at 268.

The public's, and therefore the press's, interest in litigation is both legitimate and undeniable. Broad proscriptions on lawyer speech will not stem this tide. The growing acceptance of cameras in the courtroom is a reflection of this public interest, and early concerns over the resulting harm to fair trial interests, *see Estes v. Texas*, 381 U.S. 532 (1965), have given way to evolving accommodations between the public's interest in access and fair trial interests. *See Chandler v. Florida*, 449 U.S. 560 (1981) (televising criminal trial not a *per se* constitutional violation; absent proof of prejudice from broadcast of trial, no constitutional violation).

The best shelter for fair trial interests lies not in the enforced silence of lawyers but in the voir dire process and the other existing non-speech-related protections built into the justice system, as enforced by the prudent exercise of judicial discretion. Indeed, the mischief wrought by uncounseled speech of trial participants and by the failure of trial courts to be vigilant in protecting fair trial interests is powerfully illustrated in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the case which launched the professional bar on its journey to fashion the challenged ethical rules governing counsel speech.

In *Sheppard*, the defendant had been accused of murdering his pregnant wife at their home, and these charges received "massive, pervasive, and prejudicial publicity." *Id.* at 335. Despite Sheppard's cooperation with investigating authorities, *id.*, prosecutors publicly accused Sheppard of failing to cooperate. *Id.* at 338. Sheppard then acquiesced in the coroner's request to re-enact the crime at his home before assembled law enforcement and press officials. Newspapers, quoting a local prosecutor, reported that unlike other suspects, Dr. Sheppard had refused a lie detector test. *Id.* at 339 & n.5.

Prior to trial, newspapers published the names, photographs, and addresses of prospective jurors, and each had received some communication about the case as a result. *Id.* at 342. The trial was conducted in a "carnival atmosphere," *id.* at 358, with the unsequestered jurors repeatedly exposed to lurid and "outrageous" prejudicial publicity, *id.* at 348, including statements by police officials contradicting defendant's testimony and defense. The trial court denied defense requests for a change of venue, and declined to inquire about juror exposure to publicity because it believed that the First Amendment rendered it powerless to protect against obvious threats to a fair trial. *Id.*

This Court reversed Dr. Sheppard's conviction and remanded for a new trial because of the relentless wave of prejudicial publicity, and in so doing, suggested that "courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." *Id.* at 363. Obviously, many of the prejudicial practices tolerated by the *Sheppard* trial court would shock jurists today, and presumably trial courts would

be much more vigilant to exercise their ample powers to protect fair trial interests.

The facts of the *Sheppard* case, however, additionally serve to illustrate an important point left unstated by that opinion: all of the many cited instances of prejudicial publicity originated either from the prosecution or from uncounseled comments by Dr. Sheppard.[28] According to this Court, "The prosecution repeatedly made evidence available to the news media which was never offered at trial. Much of the 'evidence' disseminated in this fashion was clearly inadmissible." *Id.* at 360. This is fully consistent with the expert testimony adduced in this case, (TR 26, 27; JA 20, 21) as further supported by knowledgeable commentators,[29] that the principal source of prejudicial pretrial publicity generally is the prosecution or its agents.[30] The *Sanders* case was no exception.

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[28] The *Sheppard* opinion identified a number of press reports that emanated from the prosecution but none that came from defense counsel. The opinion's lengthy discussion of the facts concludes with the comment that "many of the prejudicial news items can be traced to the prosecution, as well as the defense." *Id.* at 361. The opinion, however, attributes no news items to the defense, and the state's interest in a fair trial was not compromised nor at issue in *Sheppard*.

[29] *See, e.g.*, Matheson, *The Prosecutor, the Press, and Free Speech*, 58 Fordham L. Rev. 865, 890 n.143 (1990) ("It is well-established that reporters get most of their crime news from law enforcement sources"); Wilcox, *An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial-Free Press Issue*, 18 Hofstra L. Rev. 1, 15, 26 (1989) (study suggests prosecutorial bias in news coverage).

[30] In fact, some commentators have suggested that this imbalance in the ability or penchant to engage in prejudicial pretrial publicity favors regulating only speech by the prosecution and its agents. *See* A. Friendly & R. Goldfarb, *Crime and Publicity: The Impact of News on the Administration of Justice* 135-36, 247-48 (1966). Indeed, a case can be made for more stringent regulations when the government engages in stigmatizing speech. *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951); *Lasswell*, 673 P.2d at 857. *See generally* M. Yudof, *When Government Speaks* (1983).

All this is not to say that defense counsel can never be the source of prejudicial publicity or that the prosecution is always the source of such publicity. Rather, the point is that prior to the institution of formal charges, a properly counseled defendant has a potent disincentive to engage in speech. Wholly apart from ethical obligations or fair trial concerns, defense counsel also have strong incentives for self-regulation of speech prior to trial.

The interests reinforcing defense counsel's reluctance to speak are many and varied. They include: (i) avoiding the association of a client's name with a crime; (ii) avoiding evidentiary admissions; (iii) avoiding a premature commitment to particular positions prior to complete investigation and review of the prosecution's case-in-chief; (iv) avoiding positions that could make a plea agreement difficult or impossible; and (v) preserving the ability to seek sentencing leniency under the Sentencing Guidelines for acceptance of responsibility or for cooperation with the government.[31] As a result, the prosecution and its agents typically exercise a monopoly on speech prior to a charging decision. If this natural monopoly is abused, as here and in the *Sheppard* case, the victim will invariably be the defendant.

Much, if not all, of the potential threat to fair trial interests from the defense is answered by the good judgment and professional interests of defense lawyers. If, as here, the source of prejudicial pretrial publicity is the police, then the government can place reasonable restrictions on their speech. This Court has upheld employment-related speech restrictions on government employees under the First Amendment. *See, e.g., Connick v. Myers*, 461 U.S. 138, 151-52 (1983); *Snepp v. United States*, 444 U.S. 507 (1980).

In conclusion, lawyers are reliable, if partisan, commentators. The public, no less than juries, recognize that

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[31] *See* United States Sentencing Commission, Guidelines Manual §§ 3E1.1, 5K1.1 (1991).

lawyers are spokespersons for another, whether it is the State or an accused, and accordingly they speak on their client's behalf. Their speech may be viewed with trepidation by some, much as the British courts in the colonial period found the reporting of colonial newspapers unsettling; but our system of justice is sturdy enough to tolerate it without resort to broad prophylactic rules prohibiting such speech solely because it comes from lawyers.

B. Reducing the First Amendment Rights of Lawyers Will Simultaneously Reduce the First Amendment Rights of Clients and the Public.

Lawyer speech about pending litigation affects at least three distinct First Amendment interests. The first, and most obvious, are the speech rights of the lawyer. The second interest at stake is that of the lawyer's client, who relies on his lawyer to speak on his behalf. The third interest is that of the public and its First Amendment interest in obtaining information about pending matters of public concern. Each of these distinct interests offer their own independent reasons for according plenary First Amendment protection to the speech involved in this case.

Accurate speech by lawyers regarding litigation in which they are participants merits First Amendment protection. Lawyers have an important role in the administration of justice, and speech is often the only instrument at their disposal to accomplish their professional duty as advocates. While their speech rights, like those of other speakers, are not absolute, speech by lawyers serves the same objectives in a democratic society—to foster informed judgments about matters of public importance. Nor can lawyer speech in this context be trivialized as merely a species of commercial speech, even though lawyer speech of a commercial character also enjoys First Amendment protection. *See Bates.* Lawyer speech, no less than that of the press, "guards against the miscarriage of justice by subjecting the police, prosecutors, and

judicial processes to extensive public scrutiny and criticism." *Sheppard*, 384 U.S. at 350.[32]

Clients of lawyers also have an important interest in speaking through their legal representatives, and our system has long relied on lawyers to perform this task.[33] Initially, such speech serves the vital Sixth Amendment interests of a client. To be sure, the speech here arises outside the courtroom. The impact of public prosecutions, and a client's interest in responding, however, are often played out beyond the courtroom. Here, for example, Grady Sanders was compelled to close his business due to the publicized attention of law enforcement on alleged misconduct therein, and the publicity contributed to Mr. Sanders' inability to obtain a gaming license for his ground lease in Atlantic City.

Just as clients carefully select counsel because counsel's words and conduct can bind them inside a courtroom, so too must clients rely on counsel to speak on their behalf outside of court in a way calculated to assist, and not compromise, their cause. Surely the Framers of the Bill of Rights did not intend to guarantee the Sixth Amendment right to speak though counsel in a criminal trial only to withdraw the protections of the First Amendment for such speech outside the courtroom door.

Nor is it any answer to contend that clients can merely speak for themselves or through non-lawyers. As this Court recognized in *Brotherhood of R.R. Trainmen*, 377 U.S. at 7, "Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries." Clients have a right to

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[32] *See Nebraska Press*, 427 U.S. at 587 (robust commentary on the criminal justice system improves "the quality of that system by subjecting it to the cleansing effect of exposure and public accountability").

[33] The right to speak through counsel as to both law and fact was a hard won victory in English common law in the century prior to the enactment of the Sixth Amendment. *See Faretta v. California*, 422 U.S. 806, 823-28 (1975); L. Levy, *Origins of the Fifth Amendment* 322-23 (1968).

speak through their attorney, and to have the benefit of counsel's judgment and abilities in speech related to public accusations.[34]

Finally, the public has a First Amendment interest in the speech of lawyers about pending litigation. The First Amendment protects both the source of speech and "its recipients." *Virginia Bd. of Pharmacy*, 425 U.S. at 756; *accord Procunier v. Martinez*, 416 U.S. 396, 410 (1974); *Kliendienst v. Mandel*, 408 U.S. 753, 762-63 (1972). This Court has held that the First Amendment 'necessarily protects the right to receive.'" *Virginia Bd. of Pharmacy*, 425 U.S. at 757. As applied here, the First Amendment protects the right of the public to receive information about pending litigation from participating counsel. *See Chicago Council of Lawyers*, 522 F.2d at 250 (lawyers a "crucial source of information and opinion" about justice system).

In summary, lawyer speech about pending litigation involves three distinct and independent interests, each of which merit First Amendment protection; suppression of one suppresses the others. The tension between the First and Sixth Amendments cannot be resolved by simply creating a special class of speakers, lawyers, with inferior First Amendment rights. Rather, any reconciliation between the First and Sixth Amendment interest at stake must fully satisfy each.

IV. THE CHALLENGED SPEECH RESTRICTION IS NOT NECESSARY TO PRESERVE FAIR TRIAL INTERESTS.

The speech regulation at issue, Rule 177, is not essential to the protection of fair trial interests of either the State or defendants. This Court has identified numerous

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[34] " 'One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place'." *Spence v. Washington*, 418 U.S. 405, 411 (1974) (quoting *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939)); *Healy v. James*, 408 U.S. 169, 183 (1972); *see also Consolidated Edison Co. of New York v. Public Serv. Comm'n of New York*, 447 U.S. 530, 541 n.10 (1980).

means at the disposal of courts to prevent prejudice from extrajudicial statements. In addition, disciplinary authorities charged with regulating the conduct of lawyers outside the courtroom can sanction speech which presents a clear and present danger to the conduct of a fair trial.

A. Courts Can and Should Protect Fair Trial Interests from Extrajudicial Speech.

This Court made clear in the *Sheppard* case that it placed principal responsibility on trial judges for insuring that extrajudicial speech does not prejudice the fairness of trials. This guidance was no doubt prompted by the egregious facts of the *Sheppard* case as well as by the trial court's reluctance in *Sheppard* to take any steps to protect fair trial rights. In *Nebraska Press*, this Court held that trial courts should not issue categorical restraining orders on extrajudicial speech without a prior judicial finding that suppression of specific speech was necessary for the preservation of fair trial interests in a particular case.[35]

These apparently conflicting signals to trial judges, in fact reflect the sound accommodation that this Court has reached in fair trial and free speech disputes. As this Court has observed, "free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." *Bridges*, 314 U.S. at 260. This Court has chosen to give each right its due, and has vested trial courts with substantial responsibility to pilot our system of justice on a course between the Scylla of unfair trials and the Charybdis of speech suppression on matters of public moment.

The *Sanders* case is an example of the system working smoothly, as opposed to the system under stress revealed by the facts of the *Sheppard* case. Voir dire revealed that

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[35] Even in the context of litigation over sensitive issues of national security, narrowly tailored protective orders have been held more appropriate than broad gauge non-disclosure orders. *See Alderman v. United States*, 394 U.S. 165, 181-85 (1969).

an impartial jury could and was impaneled six months after the allegedly prejudicial remarks. The trial court did not have to resort to its considerable arsenal of more potent devices to protect fair trial interests, such as continuances, venue transfers, jury instructions, juror sequestration, speech restraint orders under authority of *Nebraska Press*, or contempt proceedings. The absence of any extraordinary measures in the record is strong evidence of the *de minimis* nature of the alleged "danger" posed by petitioner's comments. If the trial court did not have to strain to protect fair trial interests, the alleged threat to fair trial interests cannot be characterized as "extremely serious and the degree of imminence extremely high." *Bridges*, 314 U.S. at 363.

B. Disciplinary Authorities Can and Should Protect Fair Trial Interests.

Those charged with the regulation of attorney conduct do have a role in protecting fair trials. Their responsibility, however, is secondary to that of the courts. In augmenting court efforts to preserve fair trials, however, disciplinary authorities must navigate the same path between fair trial and free speech interests that the constitution requires of courts.[36] Accordingly, speech regulations upon attorneys must follow the same course prescribed by this Court in its march from *Bridges* to *Landmark*. Specifically, attorney speech regulations cannot, as does Rule 177, proscribe whole categories of attorney speech on the presumption that it will have a prejudicial impact regardless of the timing or circumstances of its utterances.[37]

[36] The activities of integrated bar associations are equally subject to the First Amendment. *Keller v. State Bar of California*, 110 S. Ct. 2228 (1990).

[37] For example, Rule 177 labels as "ordinarily" prejudicial attorney speech about the existence or contents of a confession. This Court in *Nebraska Press* invalidated a categorical ban on the pretrial publication of a defendant's confession because the threat publication allegedly posed to fair trial interests was not substantiated in the record. So too, in *Stroble* this Court upheld

The draftsman of Model Rule 3.6 chose to create categories of presumptively proscribed speech in order to provide greater clarity for lawyers. While this is a commendable end, the means chosen is constitutionally infirm. The legacy of this Court's First Amendment jurisprudence is that categorical prohibitions on speech are suspect. *Primus*, 436 U.S. at 432. This suspicion is founded on the historical experience that categorical speech proscriptions become a substitute for reasoned and independent judgments anchored in the facts of individual circumstances. The rationale for this suspicion is evident in this case, as petitioner was sanctioned upon a record containing no independent evidence of a threat to fair trial interests other than the presumption of harm in Rule 177(2)(b).

The requisite guidance for attorneys must come from the constitutional standard set by this Court for restrictions on such speech, a line that this Court has previously described as the clear and present danger test. This Court need not, and perhaps should not, attempt to draft a code for regulating attorney speech. *Nebraska Press*, 427 U.S. at 551 ("it is not the function of this Court to write a code"). Instead, as Justice Reed predicted in the *Pennekamp* case, the limits on speech compatible with the clear and present danger standard can be fixed on a case by case basis. Those who fear that this will trap the unwary attorney can take some comfort in knowing that the standard itself is a stringent one, and is therefore likely to sanction only speech which poses a serious and imminent threat to fair trial interests.

a defendant's death sentence notwithstanding the prosecution's release of the defendant's confession to the media six weeks before trial because, in the judgment of this Court, its publication did not threaten defendant's fair trial rights. Certainly, prudence would dictate caution on the part of a prosecutor before releasing a confession, but this Court has made it plain that publication of such a key item of evidence does not necessarily prejudice fair trial interests.

V. RULE 177 IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE.

The challenged speech regulation, Rule 177, is cast as a prohibition of certain types of utterances, coupled with a list of comments that are presumptively within its sweep, and a further list of comments which the attorney may presumably safely make. The Rule is unconstitutionally vague in that these conflicting categories of speech are contradictory, thus leaving counsel uncertain as to whether a particular utterance is both fair and foul, a status inviting discriminatory enforcement of the Rule.[38] Moreover, defining the permissible scope of speech as that which lacks "elaboration", is, especially as to lawyers, an unclear line. Finally, even if the categorical speech prohibitions of Rule 177 are sufficiently precise to give fair warning of proscribed conduct, they are unconstitutionally overbroad in that they also suppress protected speech.

A. Rule 177 Is Void for Vagueness.

Vague laws are infirm because their imprecision fails to give fair notice to those who would obey them and their ambiguity permits discriminatory enforcement. *See Kolender v. Lawson*, 461 U.S. 352, 358-59 (1983).[39] The facts of this case amply demonstrate the pernicious impact of both vices.

Mr. Gentile was found below to have violated Section 2(d) of Rule 177 which proscribes uttering "any opinion as to the guilt or innocence of a defendant or suspect in a criminal case." Section 3(a) of the same Rule, however, states that, *notwithstanding the prohibitions of Sections 1 and 2*, counsel "may state without elaboration: a. the general nature of the claim or defense." (emphasis

[38] Mr. Gentile, in his answer, raised discriminatory enforcement as an affirmative defense. (Answer and Affirmative Defenses to Complaint, R3-5.)

[39] Of these two vices of vague laws, this Court has held that the possibility of discriminatory enforcement is the greater evil to be avoided. *Kolender*, 461 U.S. at 358 (O'Connor, J.).

added). Mr. Gentile testified below that, after studying and researching these two competing directives, he viewed them as contradictory and was unsure as to what he was permitted to say on this subject "without elaboration" versus what was proscribed. (TR 93, JA 58.) No explicit attempt was made by the Nevada Supreme Court or the disciplinary authorities to reconcile these contradictory provisions of the rule.[40] The same apparent conflict arises between Rule 177(2)(a)'s prohibition of commentary about a witness's credibility or criminal record, and the authorization in Rule 177(3) to comment on, among other things, "the general nature of the defense," "information contained in a public record," the "general scope of the investigation, the . . . defense involved, . . . the identity of the persons involved," and the "identity of investigating officers or agencies."

The prospect for discriminatory enforcement implicit in such imprecise regulations is also apparent on this record. Here, defense counsel's measured comments were in response to the prosecution's patent Rule violations in disclosing prejudicial and inadmissible information, including polygraph results.[41] Nevertheless, defense counsel

[40] Subsequent to the filing of Mr. Gentile's petition for certiorari to this Court, the Nevada Supreme Court amended Rule 177(1) to indicate that its general prohibition on prejudicial speech applies "notwithstanding the provisions of any . . . contrary rule." November 1, 1990 Order of Nevada Supreme Court. Presumably, this amendment indicates that the general prohibition of Rule 177(1) supercedes any exception furnished in Rule 177(3). Whether this cures or exacerbates the inconsistency between Rule 177(2) and Rule 177(3) is totally unclear.

[41] For example, Rule 177(2) prohibits commentary on the "performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test." Here, the police repeatedly commented on the polygraph tests, and the fact that their witnesses passed such tests but Mr. Sanders refused to take one. Such tests are inadmissible in evidence, and lawyers are also prohibited from disseminating inadmissible evidence under Rule 177(2)(e). Nevada Supreme Court Rule 179.5 (1986), requires prosecutors to exercise care to prevent law enforcement agents from making such prohibited statements, a duty repeatedly

is thereafter subject to discipline. This is not to suggest that derelictions on the part of the prosecution excuse conduct by defense counsel. The point is that the ambiguities inherent in the Rule afford ample opportunity for its discriminatory enforcement. When the speech takes place in the context of an adversarial setting such as our criminal justice system, it does not require cynicism to ascribe discriminatory motives to the one-sided enforcement of ambiguous speech prohibitions against the victor in a heated contest.

B. Rule 177 Is Overbroad.

As this Court stated in *NAACP v. Button*, "First Amendment freedoms need breathing space to survive." 371 U.S. at 432-33. Here, the categorical speech prohibitions of Rule 177 fail to provide such space. Under this Court's overbreadth doctrine, even if a sufficiently precise law is facially applicable to a party's speech, the law may nonetheless be constitutionally invalid if it equally applies to protected speech. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Rule 177 is substantially overbroad.[42]

Rule 177's overbreadth is implicit in its categorical approach toward proscribed speech; speech on certain subjects is presumptively prohibited regardless of the circumstances surrounding the speech.[43] The Rule's

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and clearly unfulfilled here. Likewise the chief prosecutor's comment after arraignment that he could not bring charges unless he had proof of guilt beyond a reasonable doubt is legally incorrect and is as equally close to an opinion on guilt as anything Mr. Gentile said.

[42] While this Court has previously held that the overbreadth doctrine should be invoked only in cases where the challenged law is substantially overbroad, the requirement of substantial overbreadth has been limited to First Amendment cases involving both speech and conduct. *Broadrick*, 413 U.S. at 615. Here, the proscribed activity is mere speech unabridged with action.

[43] For example, Rule 177(2)(b) asserts that publication of a confession "ordinarily" constitutes a prejudicial threat to fair trial interests. In *Nebraska Press*, this Court rejected the identical assumption about publication of a confession.

breadth is further evident in the fact that it applies to non-jury proceedings, including bench trials in criminal cases and other "adjudicative proceedings." *Cf. Craig*, 331 U.S. at 377 ("Judges are supposed to be men of fortitude, able to thrive in a hardy climate"). Moreover, the Rule's prohibitions do not even distinguish between speech by lawyers who are counsel of record and other lawyers, including journalist lawyers such as Anthony Lewis or Fred Graham. Finally, the Rule purports to apply to lawyer speech uttered without intent to prejudice the fairness of trials, a reach inconsistent with this Court's First Amendment jurisprudence. *See Scales v. United States*, 367 U.S. 203, 229-30 (1961) (First Amendment prohibits proscription of speech without requirement of specific intent). The net result is a chilling effect that withdraws whole categories of protected speech from the public arena. Accordingly, Rule 177 is fatally overbroad.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the judgment of the Nevada Supreme Court should be reversed.

Respectfully submitted,

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